STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CHARLES PITTS,
Plaintiff/ Appellee aut

SUPREME COURT CASE NO.:

260426

COURT OF APPEALS CASE NO.: 260116

LOWER CASE NO.: 02-24368-DP
JUDGE DUNCAN M. BEAGLE
Genesee

v

SUSAN BEAM, ~~(aka CAPANZZI)~~
Defendant/Appellant ee

Maureen I. Martin Caster, P43201
Attorney for Plaintiff/Appellee
1000 Beach Street
Flint, Michigan 48502
810-233-0484

Debra F. Donlan, P37820
Attorney for Defendant/Appellant
714 Beach Street
Flint, Michigan 48502
810-767-5556

128374
AIK
5/3
27396

APPLICATION FOR LEAVE TO APPEAL

PLAINTIFF/APPELLEE'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

STATEMENT OF SERVICE

PREPARED BY:
Maureen I. Martin Caster, P43201
Attorney for Plaintiff/Appellee
1000 Beach Street
Flint, Michigan 48502, 810-233-0484

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CHARLES PITTS,
Plaintiff/ Appellee

SUPREME COURT CASE NO.:

COURT OF APPEALS CASE NO.: 260116

LOWER CASE NO.: 02-24368-DP
JUDGE DUNCAN M. BEAGLE

v

SUSAN BEAM, (aka CAPANZZI)
Defendant/Appellant

APPLICATION FOR LEAVE TO APPEAL

_____/

Maureen I. Martin Caster, P43201
Attorney for Plaintiff/Appellee
1000 Beach Street
Flint, Michigan 48502
810-233-0484

Debra F. Donlan, P37820
Attorney for Defendant/Appellant
714 Beach Street
Flint, Michigan 48502
810-767-5556

_____/

NOW COMES Plaintiff/Appellee, Charles Pitts, by and through his attorney, Maureen I. Martin Caster, and states in support of this application:

1. On December 16, 2002, a default Judgment (Order of Filiation) was entered by the Genesee County Circuit Court.

2. On December 2, 2004, Defendant/Appellant filed a Motion to Rescind th Order of Filiation.

3. On December 22, 2004, an Order Denying Mother's Motion to Rescind Order of Filiation was entered by the Genesee County Circuit Court.

4. On January 26, 2005, an Application for Delayed Application for Leave to Appeal was filed by Defendant/Appellant.

5. On February 25, 2005, an Order in Lieu of Granting the Application and Vacating the

Circuit Court order was entered by the Court of Appeals.

6. The interpretation of "child born out of wedlock" requiring a prior determination be made will result in a violation of the Plaintiff/Appellee's due process and liberty interests. The Defendant/Appellant and her husband were in the process of a divorce which would have resulted in a determination that the child was born out of wedlock when the husband died in the middle of the divorce.

7. The issue involves a substantial question as to the validity of the Paternity Act as required by MCR 7.302 (B) (1).

WHEREFORE the Plaintiff/Appellee respectfully requests the following relief:

A. Grant the application for leave to appeal and reverse the decision of the Court of Appeals;

B. Grant the application for leave to appeal and re-instate the order of the Genesee County Circuit Court;

C. Grant Plaintiff/Appellee attorney fees and costs in this matter;

D. Grant Plaintiff/Appellee such other and further relief as this Honorable Court deems just and equitable.

Respectfully submitted,

Dated: April 4, 2005

Maureen I. Martin Caster
MAUREEN I. MARTIN CASTER, P43201
Attorney for Plaintiff/Appellee

PREPARED BY:
Maureen I. Martin Caster, P43201
Attorney at Law
1000 Beach Street
Flint, Michigan 48502
810-233-0484

STATEMENT OF JUSRISDICTION

This Court has jurisdiction over this Application for Leave to Appeal pursuant to MCR 7.301 (2).

STANDARD OF REVIEW

Whether a party has standing is a question of law. This Court reviews questions of law for clear legal error, *Fletcher v Fletcher,* 229 Mich. App.19; 581 NW 2d 11 (1998).

STATEMENT OF ISSUE INVOLVED

Whether a biological father has standing to bring a paternity action when the required determination of whether or not the child was born out of wedlock was halted mid-action when the husband died in the middle of the divorce proceedings?

The Genesee County Circuit Court states the answer is "yes".

The Appellee states the answer is "yes".

The Appellant states the answer is "no".

The Court of Appeals states the answer is "no".

STATEMENT OF FACTS

Father, CHARLES PITTS, (PITTS) filed a complaint for paternity in the Genesee County Circuit Court on October 16, 2002, *Pitts v Beam,* Genesee County Circuit Court, December 10, 2004, at 37, alleging he was the biological father of the child, NIA MICHELLE PITTS, born January 17, 2001. Mother, SUSAN BEAM, (MOTHER) was personally served with the summons and complaint and failed to file an answer, *Pitts* at 37. A default was entered against MOTHER on November 18, 2002.

MOTHER was married to GEORGE ALAN BEAM (BEAM) from 1982, *Pitts at 8,* until his death on January 25, 2001. At the time of BEAM's death, MOTHER had been involved in a long term relationship with PITTS which resulted in her pregnancy, *Pitts* at 25. BEAM filed a complaint for divorce on November 1, 2000, *Pitts* at 87. The logical conclusion to his action for divorce would have been the determination of that the child, NIA, was born out of wedlock however his death on January 25, 2001, *Pitts* at 38, only eight days after the birth of the child, ended the divorce action, *Pitts*at 80.

MOTHER and PITTS continued their relationship. MOTHER acknowledged PITTS as the biological father of the minor child as is illustrated by the child's last name on her original birth certificate which is "Pitts" and not "Beam", *Pitts* at 89. MOTHER also acknowledged PITTS to be the father of the minor child when she had him sign as the father the Petition to Change Name for the minor, *Pitts*at 109. MOTHER stated this was so that the minor child could receive Social Security benefits, *Pitts* at 54. The relationship began to break down and PITTS filed a complaint for paternity on October 16, 2002. MOTHER was personally served, failed to

answer the complaint and a default Order of Filiation was entered on December 16, 2002. A true copy of the Order of Filiation was served on MOTHER at her last known address.

MOTHER had moved from Michigan to Pennsylvania shortly after the Complaint for Paternity was filed and she was personally served which resulted in denying PITTS any further contact with the minor child and eroding the parent/child relationship. Her response to the court orders was to simply ignore them and act against them, *Pitts at 38*.

MOTHER's continued disregard of the court order left PITTS with no option but to request a change in custody. MOTHER was served with a notice of hearing and motion but failed to appear in court or to answer the motion. Therefore an order changing custody was entered on March 24, 2003. PITTS proceeded to try and contact MOTHER in a variety of ways which included prosecutors, police, the Social Security Administration, and a private investigator, *Pitts* at 92. MOTHER's knowledge of the court proceedings and of Pitts's actions to locate her are clearly shown by such things as her failure to try and re-instate Social Security benefits to the minor child which were stopped when the Social Security Administration received the order granting PITTS custody of the child, *Pitts* at 83-4, and 96. It was clearly mother's intent to deprive both PITTS and the minor child of the father/child relationship to which she had actively participated in for over a year and one-half, from the minor child's birth on January 17, 2001, until she left the state sometime around October/November 2002.

Upon finally locating the minor child in November 2004, PITTS went to the State of Florida and asked the court to recognize the order granting him custody which had been issued by the Genesee County Circuit Court, *Pitts* at 4. PITTS then brought the minor child home with him to Michigan.

MOTHER then returned to Michigan and filed a motion requesting the Order of Filiation to be rescinded and the minor child be returned to her. The court scheduled a hearing and requested affidavits be supplied by each party answering specific questions posed by the court. After a hearing, the court issued an order denying the MOTHER's request and scheduling a settlement conference and trial date on the issue of custody.

MOTHER filed a claim of appeal which was dismissed. The Court of Appeals, on January 21, 2005, issued an order stating it lacked jurisdiction because the order being appealed was a post-judgment order that did not affect the custody of a minor as an evidentiary hearing date had been scheduled. MOTHER then filed a delayed application for leave to appeal. The Court of Appeals, on February 25, 2005, issued an order in lieu of granting the application which vacated the Circuit Court's order. It is this order that PITTS is requesting leave to appeal.

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CHARLES PITTS,
Plaintiff/ Appellee

SUPREME COURT CASE NO.:

COURT OF APPEALS CASE NO.: 260116

LOWER CASE NO.: 02-24368-DP
JUDGE DUNCAN M. BEAGLE

v

SUSAN BEAM, (aka CAPANZZI)
Defendant/Appellant
_____/

Maureen I. Martin Caster, P43201
Attorney for Plaintiff/Appellee
1000 Beach Street
Flint, Michigan 48502
810-233-0484

Debra F. Donlan, P37820
Attorney for Defendant/Appellant
714 Beach Street
Flint, Michigan 48502
810-767-5556
_____/

PLAINTIFF/APPELLEE'S BRIEF IN SUPPORT OF APPLICATION

FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

PREPARED BY:
Maureen I. Martin Caster, P43201
Attorney for Plaintiff/Appellee
1000 Beach Street
Flint, Michigan 48502
810-233-0484

QUESTION PRESENTED

Whether a biological father has standing to bring a paternity action when the required determination of whether or not the child was born out of wedlock was halted mid-action when the husband died in the middle of the divorce proceedings?

STANDARD OF REVIEW

Whether a party has standing is a question of law. This Court reviews questions of law for clear legal error, *Fletcher v Fletcher,* 229 Mich. App.19; 581 NW 2d 11 (1998).

ARGUMENT

Although the question of interpreting the Paternity Act, MCL 722.711 - 722.730; MSA 25.491 - 25.510, has been previously before this Honorable Court, this case presents a novel question, whether a biological father has standing to bring a paternity action when the required determination of whether or not the child was born out of wedlock was halted mid-action when the husband died in the middle of the divorce proceedings?

CHARLES PITTS, Plaintiff/Appellee, (PITTS) and SUSAN BEAM, Defendant/Appellant, (MOTHER) were involved in a long-term relationship while MOTHER was married to GEORGE ALAN BEAM (BEAM). During this relationship, MOTHER became pregnant by PITTS. BEAM filed an action for divorce in November 2000 against MOTHER. On January 17, 2001, the minor child, NIA MICHELLE PITTS, was born, (Exhibit A, Certificate of Live Birth).

BEAM then died on January 25, 2001, eight days after the birth and before the divorce could be concluded. If not for his premature death, the divorce action would have concluded to its natural end and would have included a determination that the child, NIA MICHELLE PITTS, was not a product of the marriage and was in fact a child "born out of wedlock".

In *Girard v. Wagenmaker*, 437 Mich 231; 470 NW 2d 372 (1991) the Michigan Supreme Court interpreted the Paternity Act and stated,

> "...we hold that the Legislature did not express an intention to grant a putative father standing to establish the paternity of a child born while the mother was legally married to another man without a prior determination that the mother's husband is not the father. " *Id* at 235.

A gap in the law will remain present if the court stands with the interpretation that a child is "born out of wedlock" unless a prior judicial determination is made. The definition of "born out of wedlock" does not include the work "prior". MCL 722.711(a); MSA 25.491(a) states:

> "child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.

The *Girard* interpretation of the Paternity Act, which includes the word " prior", results in the violation of PITTS' equal protection rights by denying him the opportunity of *ever* establishing his paternity rights due to BEAM's death in the middle of divorce proceedings. Justice Cavanagh discusses the issue of due process in his dissent in *Girard* where he states:

> "The Michigan Constitution guarantees every individual the right not to "be deprived of life, liberty or property, without due process of law." Const 1963, art 1, §§ 17. A father's interest in establishing and maintaining a relationship with his child unquestionably falls within the scope of that "liberty" of which a person may not be deprived without due process." *Id* at 277.

In *Hauser v Reilly,* 212 Mich App 184; 536 NW2d 865 (1995) the question of a putative father's due process rights were discussed again in agreement with Justice Brennan's reasoning in *Michael H. v Gerald D.*, 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989) whereby a putative father had a "protected liberty interest" when he could prove he had an established relationship with the child. PITTS had established a relationship with his child which was interfered with when MOTHER left with the minor child.

Similar cases could arise which would prevent not just a putative father from establishing paternity but also a mother. If MOTHER was the one pursuing this case seeking support from PITTS, the putative father, she would also be prevented from doing so because her husband had died before such a determination had been made.

However, in the present case MOTHER is seeking to stop all contact between the minor child and her father. MOTHER continued her relationship with PITTS after the death of BEAM for over a year and a half. PITTS acted in every way as the only father to the child and developed a natural father/daughter relationship with her. Only when the relationship between PITTS and MOTHER began to break down did PITTS file an action for paternity on October 16, 2002. At the time of filing the action, there was no marriage to be preserved or invaded.

MOTHER was served personally with the summons and complaint and left the state shortly thereafter. PITTS obtained an Order of Filiation on December 16, 2002, and sought to locate MOTHER and child. His search concluded in November 2004 in Florida where the Florida court enforced the Michigan order which granted custody to PITTS. PITTS returned to Michigan and was followed by MOTHER who then filed a motion to set aside the Order of Filiation. A hearing was scheduled in Genesee County Circuit Court and after argument and

testimony the court denied MOTHER'S motion.

The Genesee County Circuit Court entered an order on December 22, 2004, which states at page six:

"This court has received sufficient evidence to conclude this child was not the issue of the marriage of Susan Beam and George Beam. Due process, fundamental fairness and the best interests of the child would be protected by denying MOTHER'S motion and allowing FATHER, Charles Pitts, to proceed in this matter." (Exhibit B)

This is the determination which the Legislature required in MCL 722.711 (a); MSA 25.491 (a) when it refers to "...that the court has determined ..." Therefore, the Order of Filiation should stand and PITTS should be the legal father of the minor child.

The Order of Filiation was entered before the determination was made that the minor child was indeed a "child born out of wedlock". Should PITTS still be the legal father? Should the issue of standing be waived? Yes. In the case, *Altman v. Nelson*, 197 Mich. App. 467; 495 N.W.2d 826 (1992), a case similar to the present case, an Order of Filiation was entered when the mother was married to someone other than the putative father. It was three years before the mother contested the order. The Plaintiff argued that "... the issue of standing was waived because defendant never challenged plaintiff's standing in the paternity action ..." *Id* at page 471. The Court agreed and held that while a mistake had been made in the exercise of the circuit court's jurisdiction that after a year the mistake could not be corrected.

It is precisely the same in the present case. MOTHER knew of the paternity action as she was personally served. Her response was to not file an answer and move to another state. MOTHER'S testimony to the Genesee County Circuit Court was that she felt she needed to do nothing upon being served with the summons and complaint. Now, after two years, MOTHER

brings herself before the court and requests that the Order of Filiation be set aside. This should not be done. MOTHER should not benefit from her actions. She is the one who allowed her marriage to BEAM to be invaded when she had an extra-marital affair with PITTS. She is the one who chose not to defend an action brought against her. Her actions have prevented PITTS and their minor child of having a loving father/daughter relationship.

The Court of Appeals in *Altman*, supra, determined it was not an issue of standing but of jurisdiction. The circuit court has been granted jurisdiction to determine paternity cases and therefore entering an Order of Filiation was but an exercise of that jurisdiction. The Defendant mother failed to object to whether or not the Plaintiff father had standing until three years after the order was entered. The Court stated in *Altman* that as it had been a mistake in the exercise of the court's jurisdiction that a proper motion, brought within one year, was necessary to set aside the judgment.

MOTHER's failure to defend the action in the present case resulted in an order, which if she believed was entered in error, should have been appealed according to the court rules. MCR 2.612 (C) (1) (a) allows relief from an order based on mistake but further states at MCR 2.612 (C) (2) that such a motion must be brought within one year.

The Court in *Altman, supra*, then addressed MCR 2.612 (C)(1)(f) which states: "Any other reason justifying relief from the operation of the judgment." The Court further stated,

> "In order for relief to be granted under this subsection, three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subrules (1) through (5); (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside and (3) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice. [McNeil v Caro Community Hosp, 167

Mich. App. 492, 497; 423 N.W.2d 241 (1988), construing GCR 1963, 528.3(6), now MCR 2.612(C)(1)(f).]" *Id* at 478.

If the Order of Filiation is set aside, PITTS' will be detrimentally affected by it. He will never be allowed to play a part in his daughter's life, to emotionally or financially support her. There will be nothing that could ever fill the void in his life created by the refusal to allow him to be a responsible, loving parent simply because the uncontrollable event of a death occurred.

The court in *Altman* concluded that:

> "...the circuit court had subject-matter jurisdiction to enter the filiation order. The error in granting the order without obtaining proof of plaintiff's standing to bring the action was a mistake in the exercise of that jurisdiction. The error had to be corrected either on appeal or by a motion to set aside the judgment. The judgment was not void ab initio, and any mistake could not be corrected after one year. Furthermore, plaintiff failed to show that justice required setting aside the judgment." at 479.

In the present case, MOTHER fails to show that justice will be served by setting aside the judgment. Justice is allowing a minor child to have the chance to have a loving, involved father.

CONCLUSION

The answer to the question posed should be "yes" as not allowing Pitts to proceed creates a gap whereby the mother can prevent the biological father from ever having any contact with his child simply because the husband died before the determination that the child was not of the marriage could be made.

PRAYER FOR RELIEF

Charles Pitts, Plaintiff/Appellee requests this Honorable Court to grant leave to appeal or in the alternative to reverse the Order of the Court of Appeals and re-instate the Order of Filiation entered by the Genesee County Circuit Court and award him attorney fees and costs.

Respectfully submitted,

Dated: April 4, 2005

Maureen I. Martin Caster
MAUREEN I. MARTIN CASTER, P43201
Attorney for Plaintiff/Appellee

PREPARED BY:
Maureen I. Martin Caster, P43201
Attorney at Law
1000 Beach Street
Flint, Michigan 48502
810-233-0484